

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NEIL GAIMAN and MARVELS AND) SEP 13 2002
MIRACLES, LLC,)
Plaintiffs,) FILED
v.) JOSEPH W. SCHWABENBACH
TODD McFARLANE, et al.) CASE #
Defendants-Counterclaimants.) Case No. 02-C-0048-S

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION *IN LIMINE*
TO EXCLUDE TESTIMONY FROM JAMES CAVEN RELATED
TO ONE-OFF PROJECTS**

Defendants Todd McFarlane, Todd McFarlane Productions, Inc., TMP International, Inc., and McFarlane Worldwide, Inc. (collectively, the “McFarlane Defendants”), through their attorneys LaFollette Godfrey & Kahn and Blackwell, Sanders, Peper, Martin, and defendant Image Comics, Inc., through its attorneys, Brobeck, Phleger & Harrison, submit this motion *in limine* to bar testimony from James Caven regarding the value of claims related to disputed “one-off” projects, who has been disclosed as an expert by the plaintiffs.

In his report, Caven opines that, under Gaiman’s July 15, 1997 letter, Gaiman “would have the right to do additional literary projects (‘one offs’) with the characters Angela and Medieval Spawn. The industry term of ‘one offs’ means a short series of comic books followed by a trade paperback(s) containing the same works, and may involve other characters from different publishers.” Report, p. 3, attached as Exhibit B to the Affidavit of Todd G. Smith in

Support of Motions in Limine. Caven then endeavors to calculate damages based on Gaiman's claim that he was deprived of the opportunity to do these one-off projects. *Id.*, p. 10.

The testimony that "one off" is an "industry term" that means "a short series of comic books followed by a trade paperback(s)" is based solely on Caven's discussions with the plaintiff's other expert witness, Denis Kitchen, who told Caven of his interpretation of the meaning of a "one-off," which Kitchen defined as a mini-series of four comic book issues plus a trade paperback reprint of those four issues. However, as more fully described in the Defendants' Motion *in limine* to exclude all testimony from Denis Kitchen, there is no foundation or evidentiary basis for Kitchen's determination that the term one-off means anything other than *one* comic book. This definition is confirmed by dictionary definitions, which define "one-off" to mean "limited to a single time, occasion, instance: one-shot, unique." Merriam Webster Dictionary, MERRIAM WEBSTER COLLEGiate DICTIONARY 812 (10th ed. 1998); see also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2002).

Caven concedes that he examined Kitchen's expert report and spoke with him regarding his conclusions and opinions. Caven Report, p. 4. Moreover, Kitchen confirms that he and Caven discussed the disputed one-off claim. Kitchen transcript, p. 33. Because Caven's opinion is based on Kitchen's erroneous and foundationless testimony about the meaning of the term "one-off," this court should exclude any evidence regarding damages for the miniseries described in Caven's report.

In addition, Caven's calculations of the financial value of the "one-off" is based entirely upon Kitchen's estimation of the sales of a hypothetical pair of four-issue mini-series. As more

fully explained in the Defendants' Motion *in limine* to exclude all testimony of Dennis Kitchen, Mr. Kitchen's sales estimates are far too speculative and foundationless to be admissible.

CONCLUSION

Caven's expected testimony relating to the value of the disputed "one-off" projects is based on Kitchen's foundationless and unsupportable definition of that term. Because it would be improper to permit the plaintiff's damages expert to rely on this evidence, Caven's testimony about the value of the plaintiff's disputed one-off projects should be excluded.

LA FOLLETTE GODFREY & KAHN

Dated: September 13, 2002

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served on all counsel of record via facsimile transmission and regular mail this 13th day of September, 2002, addressed to the following:

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